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JUN 20 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 169

E. V. TURNER, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

I. C. TURNER, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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The petitioners, E. V. Turner and I. C. Turner, by their counsel, respectfully pray that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit, entered in these cases on May 23, 1955, (App. *infra*, p. 25) based on an opinion of said Court rendered on May 23, 1955 (App. *infra*, p. 25), which affirmed the judgments theretofore entered by the United States District Court for the Middle District of North Carolina, Greensboro Division.

INTRODUCTORY NOTE

For brevity and convenience, E. V. Turner and I. C. Turner, appellants below, will be referred to as petitioners; the respondent, United States of America, will be referred to as the Government. All italics, in the text of this petition, are supplied unless otherwise noted. The appendix filed by the petitioners in the United States Court of Appeals constitutes a part of the record on this petition and page references thereto are designated as (R. Vol. I). Page references to the appendix to this petition are abbreviated as (App. *infra*).

OPINIONS BELOW

There was no opinion in the United States District Court. The opinion of the United States Court of Appeals promulgated May 23, 1955, has not yet been reported. It is printed in full in the appendix to this petition (App. *infra,* p. 25).

STATEMENT OF JURISDICTION

(i) The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is dated and was entered on May 23, 1955 (App. *infra,* p. 37).

(ii) There is no order respecting a rehearing, nor any order granting an extension of time within which to file this petition. An order for stay of mandate was entered by the Court of Appeals on June 6, 1955 (App. *infra,* p. 38).

(iii) The statutory provision conferring jurisdiction upon this Court to review the judgment in question by writ of certiorari is 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by approving the ruling of the trial judge who permitted the Government to introduce evidence obtained from the petitioners' records by Special Agents of the Bureau of Internal Revenue under the pretext of a routine investigation for civil purposes, when, in fact, it appears that a criminal prosecution was contemplated by said agents at the time the investigation began?

2. Did the Court of Appeals err by approving the ruling of the trial judge denying petitioners' motion for a new trial based upon the conduct of the Assistant United States District Attorney in respect to his contacts and conversations with one of the jurors both prior to and during the trial of the petitioners?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Statutes

United States Code, Title 28, Section 1254 (1):

"Section 1254. **Courts of appeals; certiorari; appeal; certified questions.**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

Internal Revenue Code, Title 26:

Sec. 145 (b). Penalties.

"Failure to Collect and Pay over Tax, or Attempt to Defeat or Evade Tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any

manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U. S. C. 1946 ed., Sec. 145 (b)."

Constitutional Provisions

Article VI of Amendments to the Constitution of the United States of America:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Article V of Amendments to the Constitution of the United States of America:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article IV of Amendments to the Constitution of the United States of America:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On March 3, 1953, the Grand Jury for the Middle District of North Carolina returned one five-count indictment against petitioner E. V. Turner and another five-count indictment against petitioner I. C. Turner, charging each with wilful attempts to evade and defeat a large part of his own and his wife's income taxes for the years 1946 to 1950, inclusive, by filing returns fraudulently understating the amounts of their income, in violation of Section 145 (b) of the Internal Revenue Code of 1939.

Petitioners' cases were consolidated for trial, which commenced on October 4, 1954. On October 15, 1954, the jury returned a verdict of guilty on each of the five counts against each petitioner, recommending mercy as to I. C. Turner.

Judgment on the verdicts was continued by the Court until November 12, 1954, at which time petitioners' motion for a new trial was heard (R. Vol. I, p. 81). One of the grounds upon which said motion was based (Par. 12, Motion for New Trial, R. Vol. I, p. 82), related to certain contacts and conversations between the Assistant United States District Attorney, who participated actively in the trial, and one of the jurors. Information regarding this matter did not become known to petitioners or their counsel until after the trial and shortly before November 12, 1954 (R. Vol. I, p. 83). The Court conducted a preliminary inquiry (hearing on Motion for New Trial, R. Vol. I, pp. 82-95) and overruled petitioners' motion (R. Vol. I, pp. 94, 95).

Thereupon each petitioner was sentenced to imprisonment, E. V. Turner for a period of two years and I. C.

Turner, as to whom the jury recommended mercy, one year. Each petitioner was ordered to pay one-half of the court costs.

Notices of appeal to the United States Court of Appeals for the Fourth Circuit were filed November 19, 1954, jurisdiction in the Court of Appeals being conferred by 28 U. S. C., Section 1291. Oral argument on the appeal was heard on April 12, 1955, and on May 23, 1955, judgment was entered by the Court of Appeals affirming the judgments of conviction.

The facts material to the consideration of the questions presented for review are as follows:

Petitioners are brothers. During the taxable years here involved, they carried on their business of designing, fabricating and erecting commercial outdoor advertising signs and displays as co-partners under the trade name Turner Sign Company. The partnership was created in 1946, after I. C. Turner returned from duty with the armed forces although the business had been in existence since 1935. Areas in which the company did business included North and South Carolina, Georgia, Virginia and the District of Columbia.

On July 9, 1951, Special Agent Daniel S. Forbes, of the Intelligence Division of the Internal Revenue Department, contacted petitioners at their place of business and advised them that "the individual and partnership returns of the Turner Sign Company had been assigned to me for examination" (R. Vol. I, p. 4). Forbes did not deny he told petitioners this was a "routine" check (R. Vol. I, p. 5). At this time he did not advise them there was any criminal prosecution anticipated, or make any statement which would leave the impression of a possible criminal prosecution (R. Vol. I, p. 5), though he testified at the trial that he was then an Agent in the criminal investigation (R. Vol. I, p. 5).

E. V. Turner advised Agent Forbes that the books and records of the partnership were maintained by H. B. Elliott, the bookkeeper (R. Vol. I, p. 5). One of the Turners told Elliott that Forbes was "an employee of the Internal Revenue Service" who was making an examination of the books and records and told Elliott to produce them for Forbes (R. Vol. I, p. 4).

Elliott produced the books of the partnership and the sales invoices for the years 1946 through 1950, inclusive. After obtaining these records, Elliott took Agent Forbes on a tour of petitioners' plant, and into the other building. Observing a filing cabinet, Forbes inquired as to its contents and was told it contained work orders. A work order was a drawing or paper writing which could be prepared on any kind of paper, and usually it was a rough sketch of a sign showing the date, the person buying the sign and sometimes the cost of the sign, sometimes only the down payment, sometimes both and sometimes no information as to price. These were filed in alphabetical order and covered all of the taxable years here involved (R. Vol. I, pp. 6, 7).

Next Elliott and Forbes returned to Elliott's office where Elliott made space and a table available to Forbes. Elliott departed, leaving Forbes alone, whereupon the Agent returned to the plant office in the other building and secured some 35 or 40 work orders for the year 1950 out of the filing cabinet (R. Vol. I, p. 7). He then returned to Elliott's office and proceeded to check the work orders against the accounts receivable, discovering numerous work orders not shown on the books and records (R. Vol. I, p. 7).

He then proceeded to list all of the orders for the year 1950 and check them against the books of the partnership, discovering "additional numerous unrecorded jobs or work orders." (R. Vol. I, p. 8). Then Forbes checked

sales invoices which were filed in alphabetical order for the year 1950 against the accounts receivable for the year, discovering numerous sales invoices which were not shown on the books.

On July 23, 1951, Elliott delivered another set of sales invoices to Forbes, covering the years 1948, 1949 and 1950, explaining that these were the ones he should be using. On checking, these agreed with the books and records.

Forbes then proceeded to check work orders, sales invoices and books and records for the years 1949 and 1948, with substantially the same result as the check for the taxable year 1950.

On Wednesday, August 9, exactly 30 days after Agent Forbes had begun his investigation, he was joined in the investigation by Acting Special Agent Ray V. Williams. Forbes introduced Williams to petitioners and Elliott and he went upon a tour of the plant. Then Forbes explained to Williams the results of his findings up to that date (R. Vol. I, p. 9).

Following the arrival of Williams, both Agents then proceeded to list the work orders for the years 1946-1950, inclusive (R. Vol. I, p. 9). These were checked against the books including the cash book for the year 1947. Sales invoices were likewise checked against the cash book for 1947. Both unrecorded work orders and unrecorded sales invoices were discovered.

Among the books and records for 1947, which were turned over to Agent Forbes by Elliott was a "green" book which contained a list of some of the "unrecorded" work orders and "unrecorded" sales invoices.

Following the check for the year 1947, the same procedure was followed by the Agents for the year 1946, and with similar results.

The books of the partnership agreed with the returns filed for the year 1948, 1949 and 1950. For 1946, there was

a discrepancy, and for 1947 a discrepancy was explained due to accounts receivable.

Following the completion of this procedure (with the exception of the period August 17-September 4 when Forbes was away) the Agents listed all accounts receivable as shown on all the books for the years 1948, 1949 and 1950 and the cash receipts for the years 1946, 1947 (R. Vol. I, p. 9).

One day was spent by the agents checking the "patterns," which were located in the pattern room. These were "blueprints" of signs which had been erected and usually the customer's name was on the pattern. These were checked against the unrecorded sales and unrecorded work orders (R. Vol. I, pp. 9, 10).

On one occasion Williams went into the office and found Elliott putting old correspondence into the wastebasket. He went through all of this correspondence, which contained letters thanking customers for orders. These letters were checked and correspondence was found relating to sales for which no work order or invoice had been discovered (R. Vol. I, pp. 14, 15).

After compiling all of the information obtained from petitioners' records, work orders and correspondence, as above set forth, Agent Williams traveled for three or four weeks (between October 1 and October 29) to "verify some of the leads which we had on unreported sales" (R. Vol. I, pp. 15, 16).

On October 29, 1951, approximately 110 days after the investigation had commenced, and after the Agents had marshaled all of the evidence necessary for a criminal prosecution, they confronted the petitioners for the first time with the results of the examination. The Agents then presented "some of the evidence which had been developed or been found and which were not on the books and records." Neither petitioner was warned by either Agent of

his constitutional rights at this conference, although something was said about petitioners' not being required to answer questions (R. Vol. I, p. 11). E. V. Turner stated that he did not know why the sales were not reported, and that all proceeds from the sales had been reinvested in the business or used for cash expenditures. Petitioners expressed a desire to cooperate, and at the Agents' request granted permission to examine their private offices, which was done by the Agents. No additional information or records were obtained from the private offices (R. Vol. I, p. 12).

From October 29, 1951, until May 20, 1952, Agent Williams continued his investigation in order to verify the business transactions of the Turner Sign Company which were obtained from the records, work orders and correspondence in petitioners' plant in the manner above described (R. Vol. I, p. 17). He visited 160 cities and towns in North Carolina, 50 in South Carolina, 35 in Virginia, and an undetermined number in Georgia, travelling over 8,000 miles (R. Vol. I, pp. 17, 18).

The record discloses that virtually all of the Government's evidence of unrecorded sales was initially obtained from information secured from the work orders, sales invoices and correspondence obtained during the "examination" by the two Special Agents. There was no effort made by the petitioners, or anyone acting for them, to conceal, cover up, or hide any information.

At the trial successive objections were lodged against the introduction of evidence obtained from petitioners' records (R. Vol. I, pp. 8, 9, 11). These objections were overruled. This ruling applied to "any testimony relating to information from these records" (R. Vol. I, p. 9). The opinion of the Circuit Court sustained the position of the trial judge.

In respect to the second question presented for review, the facts are as follows:

The jurors who determined petitioners' cases were chosen and summoned for the June 1954 Term of the United States District Court for the Middle District of North Carolina. This panel of jurors, including the juror Buchanon whose conduct is challenged here, had served as jurors at the June criminal term of the Court. The trial of petitioners began on Monday, October 4, 1954, and continued until Friday, October 15, 1954, on which date the jury verdict was returned. Judgment of the Court upon the verdict was not pronounced until Rule Day, Friday, November 12, 1954.

Between October 15 and November 12, the petitioner E. V. Turner contacted the juror Lonnie Buchanon, and as a result of a conversation with this juror, Turner prepared an affidavit which he submitted to one of his trial counsel (R. Vol. I, p. 85). The information contained in the affidavit did not become known to either petitioner or to any of their attorneys until after the trial had been completed and only a short time before judgment was to be pronounced on the verdict.

On the morning of November 12, 1954, preceding the sentencing of the petitioners, the attention of the Trial Judge was directed to the matters which had come to the attention of counsel since the trial (R. Vol. I, p. 83).

The affidavit of the petitioner E. V. Turner, mentioned above, and the oral testimony of the witness Honeycutt (R. Vol. I, p. 93), disclosed that the juror Buchanon had made the statement that he had ridden back and forth from Sanford (his home town) to Greensboro (where the trial was held), a distance of 58 miles, during the first week of petitioners' trial with Assistant United States District Attorney Gavin, who likewise resided in Sanford. Gavin participated actively in the prosecution of the entire trial. The affidavit of Turner further indicated that the juror had learned that this association was not proper and had rented

a room in Greensboro during the second week of the trial. The juror Buchanon was not present in Court when this matter was presented and heard.

Assistant District Attorney Gavin, in reply to the foregoing was duly sworn and testified, in substance, as follows: He had known the juror Buchanon personally for 25 or 30 years; that the juror had never been his client; that he had not visited in the juror's home or the juror in his. He first knew the juror when he, Gavin, was six or seven years old and used to swing on juror's ice wagon. He went to school and was in the same class with the juror's daughter and son. Buchanon served as a juror in the United States District Court in Greensboro in June (1954) and at that time something was said about excusing him from further duty because of his age. He, Gavin, was under the impression Judge Hayes was going to excuse the juror from further service and that he, Gavin, "had no idea he would serve on this case." (R. Vol. I, 89).

Gavin stated that the juror Buchanon did ride back (to Sanford) with him on at least two occasions during the month of June (R. Vol. I, 91) when the usual cases were being tried (R. Vol. I, 90).

Before petitioners' trial began, Buchanon's daughter-in-law called Gavin and asked if the juror could ride to Greensboro with Gavin on Monday morning, the day on which petitioners' trial was to commence. Gavin agreed and met the juror Buchanon at a filling station in Sanford on Monday morning about 7:15. Gavin had his bag packed prepared to spend the week here. The juror had no luggage. Gavin inquired of the juror if he were not going to stay in Greensboro, but did not recall what juror replied. Gavin told juror Buchanon that he thought he would be excused.

On the way from Sanford to Greensboro, a distance of 58 miles, the juror asked Gavin "what kind of cases we

would have and what we were going to take up." Gavin advised the juror "income tax cases and I don't know what else." Gavin said he thought that was everything that was said about the term of Court altogether (R. Vol. I, p. 90).

When the Court afforded jurors an opportunity to be heard as to any reason why they should not serve, Buchanon asked the Court to excuse him because of the illness of his brother. At that time, Gavin stood up and called to the attention of the Court the fact that the juror was 72 years of age and had served in June. Gavin thought that the juror would be excused when that was called to the attention of the Court. The juror was not excused but was sworn and empaneled as one of the jurors to try petitioners' cases.

At the Monday afternoon recess of the Court, the juror Buchanon contacted Assistant District Attorney Gavin either right at or around the door to the Courtroom, or just outside the Courtroom, and told him that he wanted to ride home with him that afternoon. He and Gavin both lived in Sanford. Gavin told the juror that he was not going home.

Gavin reported to United States District Attorney Stanley his conversation with the juror, whereupon Stanley and Gavin went to the Trial Judge and told him that he, Gavin, did not want to talk with the juror. Gavin said that the Court instructed the jury as a body not to speak to any of the attorneys in the case either for the Government or for the defendants and not to associate with them. (The record discloses no such instruction.) Gavin stated that the juror Buchanon did not ride with him at any time after the trial of the case began and that he, Gavin, stayed in Greensboro the entire first week of the trial with the exception of one night when he went back to Sanford by himself to secure some warmer clothing. The foregoing

facts as testified to by Gavin were not disclosed to petitioners' trial counsel until he testified on Rule Day.

At the conclusion of the hearing on the Motion for a New Trial, the Trial Judge stated: "* * * There is no evidence of any impropriety or anything improper or any conduct that otherwise affected the results." (R. Vol. I, p. 94). Thereupon, the Court ruled: "Upon this preliminary investigation the Court finds there is nothing sufficient to justify any further investigation concerning the improper conduct on the part of the jury and refuses the motion based on the twelve assignments in the Motion for a New Trial."

The opinion of the Circuit Court sustained the position taken by the Trial Judge.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in holding that the evidence obtained from the petitioners' records, work orders and correspondence was admissible against them in view of the manner in which it was obtained by Special Agents of the Bureau of Internal Revenue.

I

The Court below has decided an important question of Federal law which has not been, but should be, settled by this Court.

The problem generated by the question raised here is confronting the Courts with increasing frequency by reason of the marked increase in criminal tax evasion prosecution. The dividing line between proper investigative procedure and those which encroach improperly upon constitutionally granted rights is as issue of vital importance. *United States v. Guerrina*, 126 F. Supp. 609, 610. There are no rules or regulations governing the investigative procedures of government tax agents. Until such time

as recognized criteria are adopted, the conscience of the individual agent will be the yardstick by which the constitutional rights of the taxpayer are protected. This Court can and should chart the course of criminal investigative procedure by pointing out the duty imposed upon the Agent by the Constitution. No doubt, Special Agents, engaged in criminal tax evasion investigations, occupy a difficult position, but they are not set apart from other law enforcement officers. Nor are their activities channeled into a separate and distinct realm of criminal law, totally void of constitutional protection for their quarry.

The uncontradicted facts of this case make it obvious that the Government, under the guise of a civil investigation, initially sought evidence from the taxpayers' records for a criminal prosecution. It is equally obvious that the Government continued to construct its entire case under this guise long after its agents had positive knowledge that each day of their work was developing more evidence to be used as the basis for a criminal indictment. The admission of Special Agents Forbes and Williams clearly indicate that this was a criminal investigation from its inception. It was conceived, designed and directed, from the outset, toward the ultimate criminal prosecution of petitioners. This was the goal and objective of the Special Agents assigned to the case.

There was no "transition period" where the examination changed from a routine audit or civil investigation into one with possible criminal aspects. It was planned and carried out with but one purpose—to obtain evidence from the taxpayers upon which they could be put to trial in the criminal courts.

An analysis of the "method" employed by the Bureau of Internal Revenue discloses a carefully staged pattern of conduct which compelled and demanded that the government agents inform petitioners that their cases were under

criminal investigation. This was not done. Instead, their "consent" was obtained under the pretext of a civil investigation. Not until all of the "leads," all of the unrecorded items, and all other possible indicia of tax evasion had been carefully compiled, after 110 days of "examination" were petitioners confronted with the results. At that time the case was complete and the evidence marshaled.

Embraced within the investigative procedure employed here is the admission in evidence of the unreported sales obtained by the search and seizure of the taxpayers' correspondence (R. Vol. I, p. 14). The questions propounded by the Court to the Agent in respect to the evidence obtained from the correspondence (R. Vol. I, p. 15) highlighted the impact of this testimony. The Circuit Court in its opinion proceeded on the theory that the Agents made no investigation to which petitioners did not consent and held that even if it is assumed that the Special Agents had intended from the beginning to search for evidence of criminal tax evasion, there was no violation of the taxpayers' constitutional rights.

It is petitioners' contention that where Special Agents of the Bureau of Internal Revenue, under the guise of a routine audit, deliberately attempt to conceal the criminal aspect of an investigation, that a presumption of deceit is raised and that any "consent" obtained under such circumstances from the taxpayer is not voluntarily given.

Petitioners respectfully direct to the attention of this Court an exhaustive and complete analysis of the law in respect to the question presented here. The article, prepared by Norman Redlich, appears in the January, 1955, issue of Tax Law Review, Vol. Ten. No. 2, and is entitled: "Searches, Seizures and Self-Incrimination in Tax Cases." Space does not permit embracing within this petition the detailed summary of decisions and law appearing in Redlich's article. Petitioners submit this treatise in support of

the position here asserted, particularly pages 208 to 212, inclusive.

Prior to 1948, the Courts proceeded on the assumption that an area of constitutional protection existed in respect to taxpayer's records, *Gouled v. U. S.*, 225 U. S. 298. The impact of the decision of this Court in *Shapiro v. U. S.*, 335 U. S. 1, although not a tax case, has apparently been interpreted by the Bureau of Internal Revenue as justification for obtaining a taxpayer's records through any means available. Petitioners submit that such a drastic limitation on the protection afforded by the Fourth and Fifth Amendments was not intended.

The question raised by doubtful investigative procedure is clear * * * the difficulty lies in its application to the particular case.

Petitioners submit that the undisputed facts disclosed here surpass clever detection and transcend the boundary of unreasonable pursuit of evidence. There can be no justification for the complete acquisition of a taxpayer's records, under the guise of a civil investigation, without any intimation of prospective criminal action, until the complete case against the taxpayer is assembled. There certainly is no justification for an exhaustive search of the taxpayer's entire plant and private records and correspondence without consent in order to obtain evidence to be used against him.

Petitioners' Motion to Suppress (R. Vol. I, p. 1) should have been allowed, and the evidence obtained by the Agents should have been excluded.

II

The Court of Appeals erred in approving the action of the Trial Judge in denying petitioners' Motion for a new Trial based upon the contacts and conversations between the Assistant United States District Attorney and one of

the jurors as disclosed by the evidence adduced at the "preliminary inquiry."

Petitioners respectfully submit there are two compelling reasons why this question should be reviewed:

1. The Circuit Court so far sanctioned such a departure from the usual course of judicial proceedings by the District Court as to call for an exercise of this Court's power of supervision.

2. The Circuit Court below decided a Federal question in a way not in accord with the decisions of this Court, *Remmer v. United States*, 347 U. S. 227, and in conflict with applicable decisions of other courts of appeal, *Wheaton v. United States* (C. A. 8th S. D.), 133 F. (2d) 522, 527; *Ryan v. United States* (D. C., 1951), 191 F. (2d) 779; *Stone v. United States* (C. A. 6, 1942), 113 F. (2d) 70.

Petitioners do not contend that inquiry should be made, or relief granted, in respect to the conduct of the jury upon slight pretext, mere suspicion, or for reasons which could not be deemed prejudicial. *Aiken v. U. S.* (C. A. 4, 1939), 108 F. (2d) 182, *Ray v. U. S.* (C. A. 8, 1940), 114 F. (2d) 508; *Nicely v. U. S.* (C. A. 6, 1942), 129 F. (2d) 357. But the conduct challenged here discloses a situation which transcends slight pretext, mere suspicion, or non-prejudicial indiscretion.

The Government of the United States admits (1) that its Assistant District Attorney transported the juror in question a distance of 58 miles to the juror's home on at least two occasions while a prior term of court was in progress when the usual cases were being tried, (2) thereafter transported the juror from his home 58 miles to Court on the morning petitioners' trial began, (3) when the juror requested the Court to excuse him, the same Assistant District Attorney interceded on behalf of the juror in his plea to the Court, (4) after the trial commenced, engaged in a conversation with the juror who requested transportation

home with the Assistant District Attorney that evening, (5) thereafter the same prosecuting officer actively participated in the trial of the petitioners and (6) that none of the foregoing contacts or conversations were reported to counsel for the petitioners.

The test to be applied to the foregoing facts and the question raised thereby is not, as stated by the trial Court and approved by the Court of Appeals, whether there was "evidence of any impropriety or anything improper or any conduct that otherwise affected the results" (R. Vol. I, p. 94). The standard by which these facts must be viewed is whether they created a condition from which prejudice **might** arise or from which the general public would **suspect** that the jury **might** be influenced to reach a verdict on the ground of bias or prejudice. *Stone v. United States* (C. A. 6, 1942), 113 F. (2d) 70.

Petitioners respectfully submit that the judgment below, and the opinion upon which it is based, cannot be reconciled with the law as set forth in *Stone v. United States, supra*:

> "Faith in the courts and the jury system must be maintained and it is proper that on questions such as we have here the rule should be as to support the faith of all litigants in our judicial system and, as part thereof, trial by jury. That faith can be sustained only by keeping our judicial proceedings free from suspicion of wrong. The question is, not whether any actual wrong resulted from the conversation of Calloway with the juror under the circumstances related, but whether it created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to each a verdict on the ground of bias or prejudice."
>
> "If a single juror is improperly influenced, the verdict is as unfair as if all were."

When, in the light of an objective and critical analysis, conduct on the part of a juror and an officer of the Court

creates or reflects a circumstance of genuine doubt and suspicion as to impartiality, it is imperative that the Court scrutinize such conduct not only in the light of its impact upon, and prejudice to the accused, but possibly of more importance, its impact upon the fundamental precepts of our society. Public policy, as well as the preservation of the integrity of the jury system itself, demands nothing less.

It is conceded that kindness is ordinarily a virtue. But the morning of the trial was neither the time nor the place for manifestations of kindness and good-will by the Assistant United States District Attorney to one of the jurors who was about to decide the fate of the petitioners. The kindness, as well as previous acts and manifestations of kindness as disclosed by the facts here, even granting that no wrong was intended by either the prosecutor or the juror, might well have created an unconscious bias in the juror's mind. The fact that the juror sought out the Assistant United States District Attorney, after the trial began, and requested an additional favor of him vividly discloses that the juror's mental attitude had already been tempered by the prior and recent acts of kindness bestowed upon him by the prosecuting attorney who was seeking to convict petitioners.

It is virtually inconceivable that the juror Buchanon could have entered the jury box and undertaken his sworn duty with an open and impartial mind and a mental attitude of appropriate indifference.

The conversation between the prosecuting attorney and the juror was not brought to the Court's attention in the presence of opposing counsel. It should have been. *Ryan v. United States* (D. C., 1951), 191 F. (2d) 379:

> "If jurors ask questions of counsel in private the matter should promptly be brought to the Court's attention in the presence of opposing counsel."

The failure to disclose to petitioners' trial counsel the matter which was reported to the judge by the District Attorney and his assistant precluded any possibility of counsel learning of the prior and recent contacts between the juror and the prosecuting attorney.

If the fact of the conversation had been properly called to the attention of defense counsel at the time it was reported to the Court, it is patently obvious that the other facts with respect to prior contacts, including the transportation of the juror to the Court that morning, would have been disclosed.

The Court below, in its opinion, stated: "Doubtless the prosecuting attorney would have been wiser and more discreet, if out of abundance of caution he had refrained from any kindness or manifestation of friendship towards a member of the jury; but the whole matter was carefully gone into at a hearing before the experienced judge who tried the case, and he came to the conclusion that **there was no evidence of misconduct or impropriety which in any way affected the decision of the case.**"

Petitioners respectfully submit that the test is not whether there was "evidence of misconduct or impropriety which in any way affected the decision of the case," but rather whether or not the contacts and conversations of the prosecuting attorney with the juror under the circumstances as related, created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice.

When the facts here are analyzed in the light of the foregoing principle of law, the error of the Court below becomes manifestly clear. The improper communication with the juror raised a presumption of prejudice, *Remmer v. United States, supra,* and there is no showing that no in-

jury could have occurred by reason of the irregularity. *Stone v. United States, supra.*

Petitioners respectfuly submit that a fair, even-handed administration of justice under the Constitution of the United States requires this Court to review the judgment below. To deny the relief sought here, it is submitted, would be tantamount to condoning overt manifestations and acts of kindness to jurors by prosecuting officers of the Court under conditions and circumstances when the obvious effect would be to destroy the attitude of mental impartiality required by Article VI, Amendments to the Constitution of the United States.

CONCLUSION

Petitioners respectfully submit that this Honorable Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Of Counsel.

CERTIFICATE

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

C. R. WHARTON,
ARTHUR O. COOKE.

APPENDIX

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6954

I. C. TURNER AND E. V. TURNER, APPELLANTS,
versus
UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO

(Argued April 12, 1955. Decided May 23, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Arthur O. Cooke and H. F. Seawell, Jr. (C. C. Frazier, Sr.; Frazier & Frazier, and Cooke & Cooke on brief) for Appellants, and Dickinson Thatcher, Special Assistant to the Attorney General; H. Brian Holland, Assistant Attorney General; Ellis N. Slack, John H. Mitchell, Joseph M. Howard and Kinsey T. James, Special Assistants to the Attorney General, and Edwin M. Stanley, United States Attorney, on brief) for Appellee.

SOPER, Circuit Judge:

During the years 1946 to 1950, E. V. Turner and I. C. Turner, who were brothers and equal partners, carried on the business of designing, fabricating and erecting outdoor advertising signs at Greensboro, North Carolina, under the name of Turner Sign Company. Their operations extended to North and South Carolina, Georgia, Virginia and the District of Columbia. In 1953 each of the partners was sep-

arately indicted for wilful attempts to evade and defeat a large part of his own and his wife's federal income tax for the years 1946 to 1950 inclusive, by filing returns in which the amount of their income was fraudulently understated, in violation of § 145 (b) of the Internal Revenue Code of 1939. The cases were consolidated and after an extended trial at which 129 witnesses were examined and numerous exhibits were presented to the jury, a verdict of guilty was returned as to each defendant on each of the five counts in his indictment. E. V. Turner was sentenced to two years in a reformatory and ordered to pay one-half of the court costs, and I. C. Turner, as to whom the jury recommended mercy, was sentenced to one year in a reformatory and ordered to pay one-half of the court costs.

The Government's case was based largely on evidence which showed a failure by the partners to record the gross receipts of the business on the partnership books, a failure on their part to report correctly the amount of the gross sales on their partnership information return, and a failure to disclose the correct amount of their taxable income and the taxes due by them in their individual tax returns. Thus, for the year 1946 the partners failed to report sales in the amount of $4,685.84, and claimed as a deduction purchases which were over stated in the sum of $24,285.15; and for the years 1947, 1948, 1949 and 1950 the sales reported in the partnership return fell short by the sums of $44,932.71, $35,075.52, $38,773.47 and $21,896.49 respectively. The additional partnership income and the income tax deficiencies of the partners for these years are shown in the following table:

Year	*Additional Partnership Income*	*Income Tax Deficiencies*	
		E. V. Turner	*I. C. Turner*
1946	$ 24,967.87	$ 3,672.43	$ 4,030.09
1947	44,016.01	8,255.94	8,519.29
1948	32,478.01	4,860.40	4,741.58
1949	38,620.41	5,158.50	5,071.14
1950	23,287.62	2,800.50	2,381.26
	$163,369.92	$ 24,747.77	$ 24,743.36

The probative force of the evidence obtained from the taxpayers' records, by which these figures were established, is not challenged. It is conceded in effect that the evidence was sufficient to warrant the submission of the cases to the jury. This appeal is based in large measure on the contention that substantially all of the Government's evidence was inadmissible because it was obtained illegally from the defendants by Government agents under the pretense that only a routine investigation of their tax liability was being made, whereas in fact the agents were seeking evidence on which to base a prosecution for crime.

The salient facts in respect to the investigation are not disputed. It began on July 9, 1951 when Daniel S. Forbes, a special agent of the Intelligence Division of the Internal Revenue Department, went to the main office of the business and identified himself to the two partners and told them that their partnership and individual tax returns had been assigned to him for examination. Investigation by a special agent may or may not lead to a criminal prosecution, and in this case it was Forbes' duty and doubtless his intention to report any delinquencies which he might find to his superiors. He did not give any information on this point to the partners and on cross examination was unable to say whether or not he had told them that he was making a routine "check-up."

After obtaining general information as to the background of the men, Forbes questioned them as to their books and records and was told that they were kept by H. B. Elliott, their bookkeeper; and Elliott was called in and introduced. He was told the nature of the agent's visits and was directed to produce all books and records of the business for the agent to examine. Elliott produced and showed to the agent the books of the business and the sales invoices for the years 1948, 1949 and 1950, which were kept in his office. The sales invoices for the two previous years were kept in a room upstairs. He then took the agent on a tour of the plant and the agent noticed in the plant office in another building a filing cabinet and was told by Elliott upon inquiry that it contained work orders, that is, rough sketches of signs usually showing in each instance

the date, the purchaser and the cost. They were filed in alphabetical order and covered the five tax years involved.

Facilities were provided to enable the agent to work in Elliott's office and Elliott departed leaving the agent alone. The agent studied the books and records for some time and then returned to the plant office where the work orders were kept and secured 35 to 40 of them for the year 1950. He listed and checked them against the accounts receivable on the books and discovered that many orders were not shown on the books. He then listed all of the orders for 1950, checked them against the books and found numerous additional unrecorded jobs or work orders. He also discovered numerous sales invoices which were not shown on the books and records. In some instances the unrecorded sales invoices corresponded with the unrecorded work orders, but there were some unrecorded sales invoices for which there were no work orders and some work orders for which there were no sales invoices.

Two weeks later Elliott produced another set of sales invoices for the years 1948, 1949 and 1950, grouped by months, and explained to the agent that these were the invoices he should be using and that the others were the wrong invoices. The agent found that the new lot of invoices corresponded with the books, but they did not account for any of the unrecorded work orders.

Subsequently Forbes was joined in the investigation by Acting Special Agent Ray V. Williams. He was introduced as such to the partners and they were told that he was there to assist in the investigation. Together the agents listed all the work orders for the entire period and checked them against the books and discovered both unrecorded work orders and unrecorded sale invoices for each year. On one occasion Williams discovered Elliott putting old correspondence in the wastepaper basket and upon examination found that it referred to sales for which no work orders or sales invoices had been found.

During the month of October, 1951, after compiling the information obtained in this way, one or the other of the agents spent three or four weeks in visiting persons who had bought signs from the company so as to ascertain

whether the unreported sales had actually been made. At the end of the month the two agents conferred with both partners and presented some of the evidence which they had discovered and told them that a substantial number of unreported sales had been found and asked for an explanation. The partners were told that they need not answer the questions but they were not told that their answers might be used against them in a criminal prosecution. Some items were discussed but the partners did not explain the deficiencies in the records above described. They expressed a desire to cooperate with the agents and permitted them to search their private offices, but no additional information was secured.

After the conference Williams traveled over 8,000 miles between October 1, 1951 and February 1, 1952, in visiting 50 towns in North and South Carolina, and in Virginia and Georgia, and making contact with 160 persons in following up leads from correspondence sales invoices and the work orders in order to ascertain whether the sales had been made. In this way additional sales were found as to which no data had been discovered amongst the papers of the partnership.

Significant evidence of faulty accounting was introduced with respect to specific years. For 1947 the record showed 168 entries of transactions in a certain book of which a large number were omitted from the partnership return. For 1948 the partnership return listed as a deductible expense two items for a heating plant installed in the home of the father of the partners. In 1949 the partners accepted certain electrical household appliances in exchange for signs and, except for small sums of cash used in the transactions, made no record of them on the books of the business; and in the same year a check for $4,985.50 was received in payment for a sign but at no time was the amount recorded or reported as a sale. During 1950 the partnership traded signs for automobile passenger cars but the entries were not completely recorded. In 1950 a check for $3,400.00 was received for the installation of a sign, but the check was exchanged for a cashier's check which was delivered to a motor company for an automobile which was

listed in the name of Helen C. Turner. The sale was not recorded upon the books or reported in the partnership tax return.

The defendants objected to the admission of the evidence secured from the books of the business and moved to suppress it on the ground that their consent to the examination was fraudulently obtained under the pretext of a routine investigation for civil purposes when, in fact, a criminal prosecution was contemplated. It is said that from the beginning Agent Forbes had a criminal prosecution in mind and by concealing this fact, the Government obtained the information by a false pretense. Appeal is made to the prohibition of the Fourth Amendment against unreasonable searches and seizures and the prohibition of the Fifth Amendment against compelling a defendant in a criminal case to be a witness against himself.

The contention seems to be that revenue agents who secure the consent of a taxpayer to an examination of his books with intent to obtain evidence and use it in a criminal prosecution, are guilty of deceit unless they divulge their purpose, and that the obtaining of information in such a manner violates the Fourth Amendment and its introduction in evidence violates the Fifth Amendment; and even if the examination is begun solely to ascertain the civil liability of the taxpayer and evidence of crime is unearthed, the taxpayer must be warned and given an opportunity to withdraw his consent, or all information subsequently obtained is inadmissible in a criminal prosecution.

See *Redlich, Searches, Seizures and Self Incrimination,* 10 Tax Law Review 191 (January, 1955). *United States v. Guerrina,* D. C. E. D. Pa., 112 F. Supp. 126, 126 F. Supp. 609.

In our view the facts in the pending case and the applicable rule of law do not justify the appellants' position. The agents made no investigation to which the defendants did not consent. The bookkeeper was ordered by the defendants to show the books and records of the business to the agent; he told the agent in answer to an inquiry that the contents of the filing cabinet in the plant office consisted of work orders, and he then left the agent in possession of the

material in the bookkeeper's office. Certainly the bounds of the defendants' consent were not exceeded when the agent took the work orders from the filing cabinet in the other building and examined them. They were in fact the only records of certain transactions which had been retained, and they were subsequently examined at great length by both agents in the bookkeeper's office without any objection on the part of the defendants. They themselves took the stand in their own behalf and made no complaint that they had been surprised or deceived by the agent, and one of them testified that they had never refused to cooperate with the agent with respect to any of the records in the office of the company but had given them access to the whole place.

At no time did the agents bring pressure to bear upon the defendants or conceal their identity or practice any deceit. The evidence is silent as to whether agent Forbes began the investigation as a routine examination to ascertain the civil liability of the defendants or intended from the beginning to search for evidence of crime. But even if the latter assumption be made, there was no violation of the taxpayer's constitutional rights. The relevant inquiry is always whether the taxpayer freely gave his consent, and as to that there is no dispute in this instance.

It has been expressly held time and again in tax evasion and other criminal cases that it is not essential to the admissibility of statements secured by officers of the law from a defendant that he should be first warned that the information might be used against him in a criminal case, provided that it was voluntarily and understandingly given. *United States v. Burdick*, 3 Cir., 214 F. (2d) 768, 773; *Montgomery v. United States*, 5 Cir., 203 F. (2d) 887, 892; *Lisansky v. United States*, 4 Cir., 31 F. (2d) 846, 851; *Hanson v. United States*, 8 Cir., 186 F. (2d) 64; *Powers v. United States*, 223 U. S. 303; *Wilson v. United States*, 162 U. S. 613. We are in accord with the comment of the court in *United States v. Wolrich*, D. C. S. D. N. Y., 119 F. Supp. 538, where a similar situation was presented. The court said (p. 540):

"On the issue of fraud, defendant relies heavily on cases in which law enforcement officials gained entry by masquerading as private citizens. See *Gouled v. United States,* 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; *Fraternal Order of Eagles v. United States,* 3 Cir., 57 F. (2d) 93; *United States v. Mitchneck,* D. C. M. D. Pa., 2 F. Supp. 225. Here, the revenue agent made no attempt to hide his official identity or the official purpose of his business. Surely defendant was aware that if a 'routine audit' revealed evidence of criminal liability, the agent would not ignore it merely because he was primarily concerned with civil liability. Defendant was apprised of the fact that his books were sought for investigation by an official of the Internal Revenue Bureau. On that understanding, he authorized his accountant to make his books available. I cannot accept defendant's reasoning or that of the court in *United States v. Guerrina,* D. C. E. D. Pa., 112 F. Supp. 126. A statement that the purpose of an investigation is a 'routine audit' is not the equivalent of a promise that only civil liability will be considered regardless of what the examination reveals. Nor would any accountant or businessman so understand it."

There was no error in consolidating the two cases for trial over the objection of the defendants. It was stipulated by counsel that the defendants were equal partners and owners of the business. The evidence as to additional unrecorded and unreported partnership income applied to both of them, and the amount was divided equally between them in order to arrive at their individual tax deficiencies. Questions of consolidation are within the sound discretion of the court, and in this case it was exercised wisely. *Gaudio v. United States,* 4 Cir., 179 F. (2d) 300; *Dowdy v. United States,* 4 Cir., 46 F. (2d) 417, 421; *Tincher v. United States,* 4 Cir., 11 F. (2d) 18, 21. One might almost say that it would have been an abuse of discretion to require separate trials as to the two defendants since it would have required unnecessary repetition of substantially the same evidence. See Federal Rules of Criminal Procedure, 8, 13.

The defendants raise other questions of evidence. They complain of the action of the trial judge in admitting evidence that they failed, during some of the years between 1946 and 1950, to file intangible tax returns under the law of North Carolina. They objected when the evidence was offered and the court ruled that it should be received, but was relevant only on the question of intent. On cross examination it was brought out that the witness had no knowledge as to whether the defendants were required to file the returns under the state law. No further attention was paid to the point during the subsequent days of the trial. The Government's attorneys did not press the matter any further and the attorneys for the defendants did not move to strike the evidence from the record or request any special instruction as to its effect, and none was given. Obviously the incident was insignificant and it cannot be said that the jury was prejudiced against the defendants by the knowledge that they did not file certain tax returns under the state law, when there was nothing to show that the statute required the returns to be made.

During the trial the judge admitted in evidence the testimony of Merrill Wyatt, Group Supervisor in the Intelligence Division in Greensboro. He was shown to be a qualified expert in tax matters. He prepared a computation of the tax liability of the defendants for each of the years in question, based on the testimony of Government witnesses and Government exhibits. The computation was offered in the form of schedules for each of the tax years showing the additional income of the partnership to be accounted for and the additional taxes due by each partner. It is contended that the ruling was wrong because the evidence was offered in such a manner as to lead the jury to conclude that they were required to accept as true the evidence on which the computation was based instead of allowing the jury to find the facts for themselves.

The record does not support the contention. On the contrary the court warned the jury before the computation was submitted to them that the calculations were based on evidence that had been previously adduced and that if the

jury did not believe the evidence and did not find that the income indicated had been realized by the defendants, then the computations would have no relevancy. Again in the charge to the jury the court pointed out that the computation was based in part on the evidence of sales admitted to have been made by the defendants, in part of the testimony of a number of witnesses from various parts of the country who testified that they had bought signs from the company, and in part on the *admission* by the defendants that if certain additional witnesses were present they would testify that they had paid various sums to the defendants for signs which they bought. After enumerating these three sources of proof the Judge told the jury in effect that the experts' calculations were admitted on the assumption that the jury should find that the assumed facts were actually true, otherwise they would have to dismiss such of the calculations for which there was no supporting evidence. The defendants contend that the jury could have been misled by the use of the word "admission" in referring to the testimony of witnesses not produced in court; but the jury was told that the facts were admitted to be true but only that the witnesses if present would so testify. The preparation and submission to the jury of such summaries as were made in this instance by the witness Wyatt is well nigh indispensable to the understanding of a long and complicated set of facts, and the practice has the sanction of the courts. *United States v. Johnson*, 319 U. S. 503, 519; *Beaty v. United States*, 4 Cir., 213 F. (2d) 712, 719-721; *United States v. Gaserta*, 3 Cir., 199 F. (2d) 905, 908.

The appellants complain that the court erroneously excluded evidence which would have shown that the Government had collected a part of the taxes claimed to be due by the defendants. The witness Wyatt was asked on cross examination whether the Government had not sold all the lands and all of the personal property of the partners and collected approximately $50.000 in taxes. On objection of the Government the evidence was excluded for the reasons stated in the following pronouncement of the District Judge: "It is not material whether the Government has succeeded in getting all the taxes or part of it. The question

is whether or not the defendants in filing a return filed a false and fraudulent return. It is not necessary that the defendant should succeed in his efforts to defraud the Government out of taxes. It is not material whether the Government ultimately collects it or not, the question is whether the defendant in filing his return filed one that he knew to be false when he did it, and did it with the intent to evade the payment or attempt to evade the payment of his taxes in that year, and so if an offense is committed it is committed when that happened, when he filed his return." This ruling was correct. It is true that events subsequent to the filing of tax returns charged to be fraudulent may be relevant if the evidence in regard thereto throws any light upon the intent with which the returns were filed; *Berkovitz v. United States*, 5 Cir., 213 F. (2d) 468; *United States v. Matot*, 2 Cir., 146 F. (2d) 197; *Heindel v. United States*, 6 Cir., 150 F. (2d) 493; but in this instance there is nothing to show that the forced collection of the taxes by the Government after the discovery of the crime throws any light upon the intent of the defendants when they filed their returns.

Finally it is urged that the District Judge erred in refusing defendants' motion for a new trial. The motion was based on evidence of certain contacts between Assistant United States Attorney E. L. Gavin, Jr., who participated in the prosecution, and Lonnie Buchanan, one of the jurors in the case. Buchanan had served as a juror during the criminal term of court in June and was called back in October of the same year as a member of the panel from which the jury in the pending case was chosen. Both of the men lived in Sanford, which is 58 miles from Greensboro where the court was held. Buchanan, an elderly man, had delivered ice to Gavin's family when Gavin was a child, and Gavin had gone to school with Buchanan's daughter. During the June Term Gavin gave Buchanan a ride in his car on one or two occasions in going to or from court. Just before the Turner trial began Buchanan's daughter-in-law requested Gavin to take Buchanan to court on the opening day and Gavin did so. During the ride Buchanan asked what sort of cases were going to be tried and Gavin replied

"income tax and other cases." During the selection of the jury Buchanan was called to the jury box and asked the judge to excuse him because he was 72 years of age, had served in June and had a sick brother. Gavin thereupon in open court joined in the request, but the judge refused, and Buchanan was sworn as a member of the jury. In the afternoon of the same day Buchanan asked Gavin to drive him home but Gavin replied that he was not going home. This conversation was reported to the court by Gavin who asked the judge to instruct the jury not to talk to anybody about the case and the judge gave the instruction. Gavin had come to court prepared to stay in Greensboro during the trial and did not go home during the trial except for one night for a change of clothing. There was no further conversation or contact beween the men during the trial.

It is urged that a new trial should have been granted because these friendly contacts between the juror and the prosecutor, unknown to the defendants' attorneys, were of such a character as to prejudice the juror in favor of the prosecution and deprive the defendants of a fair trial by twelve impartial jurors. We do not agree. The incidents complained of sprang naturally from the casual and friendly relationship between the two men which had existed for many years. The relationship between them could have been readily ascertained by the defendants' attorneys if they had seen fit to question the jury before he was sworn; and if they remained ignorant of the fact they had only themselves to blame. Doubtless the prosecuting attorney would have been wiser and more discreet, if out of abundance of caution he had refrained from any kindness or manifestation of friendship towards a member of the jury;* but the whole matter was carefully gone into at a hearing before the

* In *Remmer v. United States*, 347 U. S. 227, 229, the court said: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox v. United States*, 146 U. S. 140, 148-150; *Wheaton v. United States*, 133 F. (2d) 522, 527."

experienced judge who tried the case, and he came to the conclusion that there was no evidence of misconduct or impropriety which in any way affected the decision of the case. The facts were far different in the contrary decisions on which the defendants rely. See *Remmer v. United States*, 347 U. S. 227; *United States v. Rakes*, E. D. Va., 74 F. Supp. 645. It would have been a miscarriage of justice to grant a new trial in the pending case in which the evidence disclosed no reasonable doubt as to the defendants' guilt.

Affirmed.

JUDGMENT

Filed and Entered May 23, 1955

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6954

I. C. Turner and E. V. Turner, Appellants,

versus

United States of America, Appellee

APPEALS FROM the United States District Court for the Middle District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from, in this cause, be, and the same are hereby affirmed.

May 23, 1955.

MORRIS A. SOPER,
United States Circuit Judge.

ORDER STAYING MANDATE

Filed June 6, 1955

(Style of Court and Title Omitted)

Upon the application of the appellants, by their counsel, and for good cause shown,

It is ordered that the Mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said appellants in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within thirty days from May 23, 1955.

June 6th, 1955.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 169

E. V. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

I. C. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the District Court denying the motion for a new trial (R. 94-95)[1] is not reported. The

[1] References to the printed record are designated "R" to indicate "Appendix to Appellants' Brief" and "Supp. R." to indicate "Appendices for the Appellee". References to the typewritten record consisting of four volumes of testimony at the trial and one additional transcript of a supplemental hearing on November 12, 1954, are indicated "Tr." and "Supp. Tr." respectively.

opinion of the Court of Appeals (Pet. 25-37) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 37) was entered on May 23, 1955. The petition for certiorari was filed on June 20, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether evidence obtained from petitioners' records should have been excluded on the ground that the records were not voluntarily submitted to the Treasury agents.

2. Whether petitioners were deprived of a fair trial because during the first day of trial one of the jurors had a brief conversation with one of the prosecutors (with whom he was acquainted) about a matter unrelated to the case.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner

to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of the prosecution.

* * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On March 9, 1953, the grand jury for the Middle District of North Carolina returned a five-count indictment against E. V. Turner and another five-count indictment against I. C. Turner, charging each with wilful attempts to evade and defeat a large part of his own and his wife's [2] income taxes for the years 1946 to 1950, inclusive, by filing returns fraudulently understating the amounts of their income, in violation of Section 145(b) of the Internal Revenue Code of 1939. The two cases were consolidated and on October 15, 1954, after a jury trial lasting ten days (Tr. 2, 1283), petitioners were found guilty as charged. (R. 79.) On November 12, 1954, the trial court denied a motion for a new trial and sentenced E. V. Turner to two years and I. C. Turner to one year and one day in a reformatory. (R. 80). The Court of Appeals affirmed. (Pet. 25-37.)

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[2] Joint returns were filed by E. V. Turner for the years 1947 to 1950, and by I. C. Turner for the years 1948 to 1950. (Tr. 8, 10.)

The evidence adduced at the trial and at the hearing on the motion for a new trial may be summarized as follows:

During the years 1946 to 1950, petitioners, who were ~~brokers~~ brothers and equal partners, carried on the business of designing, fabricating and erecting outdoor advertising signs under the name of Turner Sign Company. On July 9, 1951, Daniel S. Forbes went to the main office of Turner Sign Company, identified himself to petitioners by showing them his credentials which indicated him to be a Special Agent of the Bureau of Internal Revenue, and told them that their individual income tax returns and the Turner Sign Company partnership returns had been assigned to him for examination. After a preliminary discussion E. V. Turner summoned the bookkeeper, H. B. Elliott, and told him to produce the books and records for Forbes to examine. Thereafter petitioners left. Elliott identified for Forbes the books and records, including work orders located in the plant office. Forbes studied the books and records in Elliott's office and then went to the plant office and secured 35 to 40 work orders for the year 1950. By comparing work orders and sales invoices with the books and records he found many items which were not recorded. (R. 2-8.)

Over a period of months, Forbes and his successor, Acting Special Agent Ray V. Williams, traced a substantial amount of unreported income to the

partnership's receipt of barter such as automobiles and electrical appliances. (Tr. 62-63, 105, 229-230, 451-452, 456, 458-459, 477-479, 497-500.) They also found recorded sales which were not reported (Tr. 84, 488), a $4,985.50 sale recorded as a loan (Tr. 101-102, 1059) after the proceeds had been converted into a cashier's check (Tr. 327-334, 714-715), deductions from recorded income made without explanation (Tr. 94-97, 1025), partners' withdrawals not recorded when made (Supp. R. 36-40; Tr. 1036-1040) and personal expenditures taken as business deductions (Tr. 142-145).

Two weeks after the investigation started Elliott produced a set of invoices for the years 1948, 1949 and 1950, grouped by months and explained to Forbes that these were the invoices he should be using and that the others were the wrong invoices. Forbes found that the new lot of invoices corresponded with the books, but they did not account for any of the unrecorded sales. (Tr. 41, 42, 44-47.) One morning Williams noticed Elliott putting into the waste basket some correspondence which upon examination (made with Elliott's permission) he found to include many references to sales which were neither recorded on the books nor otherwise evidenced by sales invoices or work orders. (R. 14-15.)

At the trial the Government proved item by item unrecorded sales for each of the years involved. Proof of the deficiency required the testimony of one hundred and twenty-nine witnesses. The addi-

tional partnership income and the income tax deficiencies of the partners (Supp. R. 20-24, 27-35) are shown in the following table:

Year	*Additional Partnership Income*	*Income Tax Deficiencies*	
		E. V. Turner	*I. C. Turner*
1946	$ 24,967.87	$ 3,672.43	$ 4,030.09
1947	44,016.01	8,255.94	8,519.29
1948	32,478.01	4,860.40	4,741.58
1949	38,620.41	5,158.50	5,071.14
1950	23,287.62	2,800.50	2,381.26
	$163,369.92	$24,747.77	$24,743.36

The defense did not attempt to disprove any of the unrecorded sales constituting the additional partnership income.

Four weeks after petitioners were found guilty, the trial judge heard testimony on a motion for a new trial based upon alleged contacts between Assistant United States Attorney E. L. Gavin, Jr., who participated in the prosecution, and Lonnie Buchanan, one of the jurors in the case. Buchanan had served as a juror during the criminal term of court in June and was called back in October of the same year as a member of the panel from which the jury in this case was chosen. Both of the men lived in Sanford, which is 58 miles from Greensboro where the trial was held. Buchanan, an elderly man, had delivered ice to Gavin's family when Gavin was a child and Gavin had gone to school with Buchanan's daughter. During the prior June Term, Gavin gave Buchanan a ride in his car on one or two occasions in going to or from court. Just before the Turner trial began, Buchanan's

daughter-in-law requested Gavin to take Buchanan to court on the opening day and Gavin did so. During the ride Buchanan asked what sort of cases were going to be tried and Gavin replied "income tax cases and I don't know what else." During the selection of the jury Buchanan was called to the jury box, and at that time asked the judge to excuse him because he was 72 years of age, had served in June, and had a sick brother. Gavin rose and called the court's attention to the prospective juror's age and to the fact that he had served in June. However, the judge refused to excuse Buchanan and he was sworn as a member of the jury. In the afternoon of the same day Buchanan asked Gavin to drive him home but Gavin replied that he was not going home. This conversation was reported to the court by Gavin who asked the judge to instruct the jury again "not to talk to anybody," and the judge did so. (R. 88-91.) Juror J. W. Honeycutt testified that Lonnie Buchanan told him that he rode with Gavin the "first week" of the trial. (R. 93.) Gavin testified that this occurred only on the morning of the first day of the trial and that he had no further contact with Buchanan during the two weeks of the trial. (R. 91.) Gavin had come to court prepared to stay in Greensboro during the trial and did not go home during the trial except for one night for a change of clothing. (R. 89, 93; Supp. Tr. 21.) The motion for a new trial was denied. (R. 94-95; Supp. Tr. 22.)

ARGUMENT

1. Petitioners contend (Pet. 14-17) that the evidence obtained from their records by the Treasury agents should not have been admitted because (1) petitioners were not warned of possible criminal prosecution, and (2) the agents' investigation was conducted under the guise of a routine examination for civil tax purposes. The contention is without merit.

It is well settled that failure to warn a potential defendant of his privilege against self-incrimination does not bar the admission of evidence obtained from him. *Powers* v. *United States,* 223 U.S. 303; *Wilson* v. *United States,* 162 U.S. 613. This rule clearly applies to income tax evasion cases. *United States* v. *Burdick,* 214 F. 2d 768, 773 (C.A. 3d), remanded, 348 U.S. 905, reaffirmed, 221 F. 2d 932, now pending on petition for a writ of certiorari, No. 168, O. T. 1955; *Montgomery* v. *United States,* 203 F. 2d 887, 892 (C.A. 5th); *Hanson* v. *United States,* 186 F. 2d 61, 64-66 (C.A. 8th); *Lisansky* v. *United States,* 31 F. 2d 846, 851 (C.A. 4th), certiorari denied, 279 U.S. 873; *Scanlon* v. *United States,* (C.A. 1st), decided June 13, 1955 (1955 P-H, par. 72,772).

The contention that the agents deceived petitioners by gaining access to their records on the pretense that their only purpose was the determination of the correct tax liability for civil assessment purposes, finds no support in the record.

There is nothing in the factual situation surrounding the permission granted to the agents to examine petitioners' books (*supra*, pp. 4, 5) which warrants such an inference. It is plain that petitioners voluntarily gave the agents access to their books and records, and there was present no fraud or deceit to vitiate their consent. Petitioner E. V. Turner testified (Tr. 1115) that he had never refused to cooperate with the agents but had given them access to the whole place. The Court of Appeals was clearly correct in concluding (Pet. 30) that "The agents made no investigation to which the defendants did not consent", and that (Pet. 31) "At no time did the agents bring pressure to bear upon the defendants or conceal their identity or practice any deceit." The case of *Gouled* v. *United States*, 255 U.S. 298, relied upon by petitioners, is clearly distinguishable, for it involved an entry gained under false pretenses and the seizure of documents without warrant or consent.

2. Petitioners contend (Pet. 17-21) that they were deprived of a fair trial because one of the prosecutors (Gavin), who was acquainted with one of the jurors who lived in his home town 58 miles from Greensboro (where the case was tried), transported him to or from Greensboro on at least three occasions before the trial began, and was approached by the juror during the afternoon of the first day of the trial with the question as to whether he would drive him home that night. As

shown in the Statement (*supra,* pp. 6-7), Gavin demurred, had no further contact with the juror during the remainder of the trial, and immediately mentioned the incident to the trial judge with the suggestion that the judge again instruct the jury "not to talk to anybody." After taking testimony concerning the pertinent facts of the matter (on petitioners' motion for new trial) the court stated its confidence that Gavin "would not be guilty of any improper conduct with a jury" and denied the motion. (R. 94.) Petitioners' only exception to the ruling (Supp. Tr. 21-22) seems to have been based on the alleged insufficiency of evidence to show the guilt of petitioner I. C. Turner.

The mere fact that Gavin was acquainted with the juror would not, of course, afford ground for challenging the juror's right to sit on the case (*Carpenter* v. *United States,* 100 F. 2d 716, 717 (C.A. D.C.); *Billington* v. *United States,* 15 F. 2d 359 (C.A. 6th)). Petitioners assert, however (Pet. 18, 21), that the contact between Gavin and the juror during the trial raised a presumption of prejudice, and that the holding of the Court of Appeals is in conflict with *Remmer* v. *United States,* 347 U.S. 227; *Wheaton* v. *United States,* 133 F. 2d 522 (C.A. 8th); *Stone* v. *United States,* 113 F. 2d 70 (C.A. 6th); and *Ryan* v. *United States,* 191 F. 2d 779 (C.A. D.C.), certiorari denied *sub nom. Duncan* v. *United States,* 342 U.S. 928. The first three cases are clearly distinguishable because they involved contacts or conversations with the jury or juror

during the trials on matters relative to the case in progress, whereas here the only contact during the trial was the juror's question to Gavin as to whether he could ride home with him that night, and Gavin's negative reply. The *Ryan* case, *supra,* far from supporting petitioners' contention, holds that even where a juror has a private conversation with the prosecutor on a matter relating to the case, the presumption of prejudice can be overcome by affirmative evidence. In affirming the conviction, the court stated (191 F. 2d at 782):

> The prosecuting attorney made no report of this conversation to the court and did not advise defense counsel. Clearly he should have done both. Nevertheless, as with the other conversations, the question in the end is whether the trial judge acted within the permissible area of discretion in not setting aside the conviction because of this occurrence.

The dispositive answer to petitioners' argument is that the trial court heard the evidence and found that there was no impropriety and no prejudice. Even assuming that the contact shown here was sufficient to raise a presumption of prejudice, the trial judge's holding was a matter within his discretion and is reviewable only for abuse of discretion. *Wheaton* v. *United States, supra,* p. 527; *United States* v. *Sorcey,* 151 F. 2d 899, 903 (C.A. 7th), certiorari denied, 327 U.S. 794; *Ryan* v. *United States, supra.* Clearly, there was no abuse of discretion here.

CONCLUSION

The decision of the court below is clearly correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 951795